IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 524 of 1995

For Approval and Signature:

HON'BLE MR.JUSTICE N.G.NANDI
and
HON'BLE MR.JUSTICE M.C.PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MANILAL BHANABHAI PATELIA

Versus

STATE OF GUJARAT

Appearance:
1. Criminal Appeal No. 524 of 1995
MR PM VYAS for Petitioner No. 1
MR AJ DESAI ld. APP for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE N.G.NANDI
and
HON'BLE MR.JUSTICE M.C.PATEL

Date of decision: 05/11/2003

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE N.G.NANDI)

1. This appeal under Section 374 (2) of the Code of

Criminal Procedure (hereinafter referred to as "the Code") is directed against the judgment and order convicting the appellant - Manilal Bhanabhai Patelia (original accused no.1) for the offence under Section 302 and Section 201 of Indian Penal Code and sentencing to suffer imprisonment for life and fine of Rs.1000/- and in default, 2 months RI and 3 years RI and fine of Rs.500/- and in default, one month RI respectively in Sessions Case No.69 of 1994 by the learned Additional Sessions Judge, Panchmahals at Godhra.

2. The facts leading to the filing of the present appeal are that Babubhai Zhalabhai resident of Village Bamroli and Manilal Bhanabhai resident of Village Ankadia both in Shehra Taluka, District - Panchmahals, were known to eachother; that on 21.2.1994 Manilal had gone to the house of Babubhai at Village Ankadia and both of them left the house of Babubhai together at about 3.00 p.m.; that while going together Manilal and Babubhai were seen by Hirabhai Maganbhai, a shopkeeper in Village Ankadia at about 3.00 p.m.; that according to the prosecution, Manilal and Babubhai came to the house of Manilal; that Manilal, leaving Babubhai at his house, came to the shop of Raising Baria for purchasing the maize at about 5.30 p.m. for the preparation of food for all; that Ramesh Manilal went to collect the wood for igniting the fire for preparation of food; that according to the prosecution during the absence of Manilal and Ramesh, Babubhai attempted to molest Manguben, wife of Manilal, which provoked Manilal; that Babubhai tried to run away, who was chased by Manilal and Babubhai was given a stick blow in the head by Manilal; that Babubhai fell down because of the stick blow; that Manilal pressed the wood stick on the neck of Babubhai which resulted into the death of Babubhai and thereby, causing death of Babubhai by throttling; that Manilal with the help of Manguben and one Narvat removed the deadbody of Babubhai, threw it in the culvert in a cavern and thereby, destroyed the evidence. The prosecution case further is that as Babubhai did not return till the late hours of 21.2.1994, in the morning of 22.2.1994 inquiries were made by the inmates of the house including at the house of Manilal but no clue was found, with the result information Exh.33 came to be lodged by Gangaben, wife of Babubhai about the non-return of Babubhai. In the meantime, Dahyabhai Kukabhai, Sarpanch of Village Bamroli having been informed in the evening of 24.2.1994 by his servant Sursing that a deadbody is lying in the culvert in a cavern and on inquiry, it was revelled that a deadbody of a male is lying in the culvert; that Dahyabhai went to Shehra Police Station for lodging the complaint; that

there Dahyabhai learnt that an information has been lodged at Shehra Police Station by people of Village Ankadia that Manilal Bhanabhai had taken Babubhai on 21.2.1994; that Dahyabhai, Sarpanch lodged the complaint, Exh.37; that thereafter the offence was registered and the usual investigation started; that on completion of the investigation, charge-sheet came to be filed against Manilal Bhanabhai (original accused no.1 - present appellant), Narvatsinh Mangubhai and Manguben Manilal; that Narvatsinh was sent to the Juvenile Court to stand trial; that Manilal Bhanabhai and his wife Manguben were presented before the Sessions Court to stand trial; that charge vide Exh.2 came to be framed for the offences under Sections 302 and 201 of Indian Penal Code against both the accused persons. The prosecution, in order to bring the guilt home, adduced oral as well as documentary evidence and the statements of the accused recorded under Section 313 of the Code as regards the circumstances incriminating against the accused emerging from the prosecution evidence. The defence is that of total denial. The trial Court appreciating the evidence on record and considering the statements under Section 313 of the Code acquitted accused Manguben Manilal of the charges levelled against her but, found accused Manilal Bhanabhai guilty for the offences alleged against him and sentenced him to suffer the sentence as aforestated. It is this conviction and the sentence imposed against the appellant - accused Manilal Bhanabhai which have been assailed in the present appeal.

3. We have heard the submissions advanced by Mr.P.M.Vyas, learned advocate for the appellant and Mr.A.J.Desai, learned APP for respondent - State. We have also reappreciated the oral as well as documentary evidence adduced in the trial Court.

4. It is not much in dispute that deceased Babubhai Zhalabhai Patelia died a homicidal death some time during 21.2.1994 to 24.2.1994. Perusal of the Inquest Panchnama, Exh.13, suggests that the deadbody was pointed out by complainant Dahyabhai Kukabhai lying in a culvert in cavern near road and identified as that of Babubhai Zhalabhai by PW-6 Gangaben, wife of the deceased and PW-7 Amkhabhai Zhalabhai, brother of the deceased. It is further suggested that the deadbody had a wound on the left side of the head and swelling on the chest with the bleeding from the nose; that the face was swollen and there were insects on the deadbody; that blisters were also seen on the chest portion of the deadbody.

PW-9 - Dr. Bhagwatisinh Punamchand Itare has

stated in his evidence that he performed the post-mortem on the deadbody of Babubhai Zhalabhai and noted external as well as internal injuries in P.M.Report, Exh.31. It has been stated that external injury no.2 is the cause of death which is on the neck and this could be caused by pressing a stick on the neck. P.M.Report, Exh.31, suggests that the cause of death to be asphyxia due to throttling. Thus, Inquest Panchnama, Exh.13, evidence of PW-9 and P.M.Report, Exh.31 sufficiently suggest that Babubhai Bhanabhai Patelia died a homicidal death.

5. It may be noted that the present case hangs on circumstantial evidence as there is no direct evidence to the occurrence.

PW-6 - Gangaben Hirabhai has stated in her evidence that incident had taken place before one year and it was a Monday; that at about 4.00 O'clock in the evening Manilal Bhanabhai had come to her place and had taken her husband along with him; that the witness identified the accused as the resident of Village Bamroli; that after her husband left with Manilal, her husband did not return and on the next day morning she along with her brother-in-law Amkhabhai inquired about her husband but of no consequence; that information was given to the police about Babubhai having left in company of Manilal and has not returned. It is further stated that Dahyabhai Gadhvi had filed a complaint that in the culvert in a cavern in the village Bamroli one deadbody was seen lying; that thereafter the witness went to Bamroli culvert where she identified the deadbody to be that of her husband.

It will be seen that according to PW-6 her husband Babubhai Zhalabhai left their house at about 4.00 O'clock in the evening of 21.2.1994 in company of accused Manilal.

6. PW-4 - Hirabhai Maganbhai has stated in his evidence that he knows the accused; that the witness has a grocery shop on the road in Village Ankadia; that on 21.2.1994 he had seen Manilal and Babubhai Zhalabhai going together at about 3.00 p.m. Nothing substantial has been brought out from the cross-examination of this witness.

Thus, it will be seen from the evidence of PW-6 and PW-4 that accused Manilal Bhanabhai and deceased Babubhai Zhalabhai went together around 3.00 p.m. on 21.2.1994. Thereafter, as per the evidence nothing was heard about Babubhai Zhalabhai and it was in the evening

of 24.2.1994 Dahyabhai Kukabhai was informed by his servant Sursinh that a deadbody of a male person is lying in the culvert of Bamroli - Nakodi kaccha road and the deadbody was identified as that of Babubhai Zhalabhai.

7. PW-2 - Pratapsing Swaroopsing, one of the panchas to discovery, has deposed to the effect that accused Manilal Bhanabhai expressed willingness to point out bushshirt and the stick and thereafter, Manilal Bhanabhai from his house discovered a stick and his own bushshirt which were recovered by drawing Panchnama, Exh.23 in presence of the witness and the other panch. That the discovery of bushshirt and the stick by accused from his house has been sufficiently suggested and nothing substantial has been brought out from the cross-examination of the witness so as to discard his testimony on this point.

Panchnama Exh.15 suggests that sample of earth-soil containing blood was recovered from the place.

8. Exh.36 is the report of Forensic Science Laboratory. The report of the serologist therein suggests that Article No.1 - the sample of earth collected from the place of incident, Article No.3 - the stick, Article No.4 - bushshirt and Article No.5 -bushshirt contained human blood of "B" group. It is suggested that the bushshirt - Article No.4 was discovered by accused vide Panchanama, Exh.23, whereas Bushshirt Article No.5 was recovered from the deadbody of Babubhai. Meaning thereby that the bushshirt of the accused contained blood stains tallying with the blood group of the deceased, also found on stick Article No.3 and the sample - soil Article No.1.

9. It is suggested from Map Exh.20 that the said place is at a distance of about 110 feet from the house of the accused. Map, Exh.20, suggests that the place of incident is at Point No.1 at a distance of 110 feet from the house of accused in the northern direction, whereas Point No.5 is the culvert in a cavern touching Bamroli Nakudi kaccha road is at a distance of 1/2 km. from Point No.1.

10. It will be seen from the above that the evidence of PW-4 and PW-6 suggest that accused Manilal Bhanabhai and deceased Babubhai Zhalabhai left together in the afternoon of 21.2.1994. The evidence further suggests that the deadbody of Babubhai was seen in the culvert in a cavern near Bamroli - Nakudi kaccha road in the evening of 24.2.1994. The evidence on record, as seen above,

further suggests that accused discovered his bushshirt and the stick containing human blood of "B" group which is also the blood group of deceased Babubhai Zhalabhai. Panchnama, Exh.15 and Exh.20 suggest that the sample of earth - soil containing human blood of "B" group was found from a place at a distance of about 110 feet from the house of the accused. Thus, there is no direct / ocular evidence to the occurrence and the circumstances relied upon by the prosecution are as pointed out above.

11. It is pertinent to note that PW-9 Dr.Bhagwatising Punamchand Itare, who performed the post-mortem vide Report Exh.30 on the deadbody of deceased Babubhai does not depose in his evidence as to what was the probable time of death of deceased Babubhai. In the P.M.Report, Exh.31, also it is not noted as to what would be the approximate time and the date of death of the person concerned. All what has been stated in the P.M.Report is that a non-digested food was found which must have consumed before 1 and 1/2 hours of the death, and it is a matter of guess as to when the death occurred. It could be at any point of time after 4.00 p.m. of 21.2.1994 till the find of the dead body around 5.00 p.m. of 24.2.1994 as deposed by PW-1. From the evidence, all that can be said is that accused and the deceased left together around 4.00 p.m. in the afternoon of 21.2.1994 and the dead body of Babubhai was found after 5.00 p.m. on 24.2.1994.

Thus, there is no evidence at all as regards the probable time of death of the deceased. It need hardly be said that to constitute evidence of last seen together, the evidence must definitely permit an inference being drawn that the victim and the accused were seen together at a point of time in close proximity with the time and date of the commission of crime.

12. The law regarding circumstantial evidence is well settled. When a case rests upon the circumstantial evidence, such evidence must satisfy thee tests : (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else. The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused.

The circumstantial evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

13. In the case of Anant Bhujangrao Kulkarni Vs. State of Maharashtra, AIR 1993 SC 110 it has been held that the place of recovery of deadbody not in exclusive possession of the accused and the circumstance that the accused was last seen together and the find of the deadbody near the portion of the building occupied by the accused would not be sufficient to hold the accused guilty.

14. In the present case, the blood has been found at a distance of 110 feet from the house of the accused. The bushshirt of the accused which is discovered vide Panchnama, Exh.23, according to the prosecution, contains the human blood which tallies with that of the deceased. It is pertinent to note that the blood sample of the accused was not taken in course of the investigation so as to suggest what is the blood group of the accused. Under the circumstances, it cannot be said that the human blood of "B" group found on the bushshirt of the accused was that of the deceased and the possibility cannot be ruled out that the bushshirt muddamal article no.7 discovered by the accused containing human blood of "B" group did not contain the blood of the accused himself. There is no proximity between circumstance of last seen together in the afternoon of 21.2.1994 and the commission of offence which time again is not known by any evidence since deadbody was seen in the evening of 24.2.1994 as deposed by PW-1. Under the circumstance, the chain of circumstances so as to be consistent with the hypothesis of the guilt of the accused and inconsistent with the innocence of the accused is not established and, therefore, in our opinion, the trial Court has erred in finding the accused guilty for the offences charged on the basis of the evidence on record as discussed above.

15. In our opinion, the chain of circumstances is not complete so as to point finger of guilt to the accused and the accused alone and, therefore, the impugned judgement convicting the appellant and sentencing him as above calls for interference setting aside the conviction recorded and the sentence imposed by the trial Court.

16. In the result, the appeal is allowed. The conviction recorded against the appellant (original accused no.1) Manilal Bhanabhai Patelia for the offences under Sections 302 and 201 of Indian Penal Code and the sentence imposed in Sessions Case No.69 of 1994 by the

Additional Sessions Judge, Panchmahals at Godhra are set aside. The appellant (original accused no.1) Manilal Bhanabhai Patelia be set at liberty forthwith, if not required in any other case. Fine, if paid, be refunded.

(N.G.Nandi,J.)

(M.C.Patel,J.)

(vipul)